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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JERRY LEE LINDSAY, JR., Appellant.	2 CA-CR 2007-0270 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200501545

Honorable Joseph R. Georgini, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura Chiasson
Tucson
Attorneys for Appellee

Harriette P. Levitt
Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Jerry Lindsay was convicted of one count each of burglary and theft. On appeal, Lindsay contends that he was denied his constitutional right

to due process as a result of prosecutorial misconduct during trial, that he was denied his right to fair trial by virtue of improper admission of evidence of other "bad" acts, and that the evidence presented at trial was insufficient to sustain guilty verdicts. Because none of these issues merits reversal, we affirm.

Background

¶2 We view the facts and reasonable inferences therefrom in the light most favorable to sustaining the convictions. *See State v. Newnom*, 208 Ariz. 507, ¶ 2, 95 P.3d 950, 950 (App. 2004). In the middle of the night, Lindsay and an accomplice entered a tire store and stole tires, as well as two security cameras. Witnesses confronted Lindsay during the burglary and informed the owners of the tire shop the next morning. The witnesses provided police with a description of Lindsay, as well as a description of and partial license plate number from Lindsay's truck. A video tape from a security camera in the shop contained footage of an intruder, who had a tattoo on his upper right arm.

¶3 Lindsay was apprehended when a police officer spotted him driving a vehicle matching the description given by the witnesses. After obtaining a search warrant, police searched Lindsay's home and seized two surveillance cameras and ten tires. Lindsay was convicted of theft of property valued at $3,000 or more and third-degree burglary and appeals from these convictions.

Prosecutorial Misconduct

¶4 Lindsay first argues that prosecutorial misconduct during trial violated his right to due process. Because Lindsay failed to raise this issue below, we review solely for fundamental error. *See State v. Bocharski*, 218 Ariz. 476, ¶ 74, 189 P.3d 403, 418 (2008)

(when defendant fails to object to alleged acts of prosecutorial misconduct, court reviews only for fundamental error). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail under the fundamental error standard of review, Lindsay bears the burden of showing "both that fundamental error exists and that the error in his case caused him prejudice." *Id*. ¶ 20. To do so, Lindsay "must first prove error." *Id.* ¶ 23.

¶5 Conduct that amounts to prosecutorial misconduct "'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). We will reverse a conviction because of prosecutorial misconduct if misconduct is present and if it could have affected the jury's verdict, denying the defendant a fair trial. *Bocharski*, 218 Ariz. 476, ¶ 74, 189 P.3d at 418.

A. Evidence of Threats to Witnesses

¶6 Lindsay first claims that the prosecution engaged in misconduct when it presented evidence that witnesses in the case had been threatened with harm if they testified against "someone going down for" the offenses in this case. According to Lindsay, this

testimony constituted misconduct because the state failed to file a notice of intent to offer the evidence pursuant to Rule 404(b), Ariz. R. Evid., and because no evidence was presented tying Lindsay to the threats.

¶7 This claim does not rise to the level of intentional and improper conduct which could be described as prosecutorial misconduct. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27. Moreover, under Rule 404(b), "evidence of other crimes, wrongs, or acts" may be introduced for relevant purposes and is only inadmissible when introduced to prove "the character of a person in order to show action in conformity therewith." Any evidence of witness intimidation is properly attributable to consciousness of guilt, and testimony relating to it is relevant so long as the accused is linked to the threat. *See State v. Settle*, 111 Ariz. 394, 396, 531 P.2d 151, 153 (1975); *State v. Contreras*, 122 Ariz. 478, 480, 595 P.2d 1023, 1025 (App. 1979) (when evidence of threats to witnesses offered to show defendant's consciousness of guilt, defendant must be linked to those threats).

¶8 Here, the state introduced testimony that witnesses in the case had been threatened with physical harm if they testified in the case. This evidence was presented in order to show that Lindsay was conscious of his guilt—not to show Lindsay's character or propensity to commit the offenses. Because the evidence was not introduced for character purposes, it is not precluded by Rule 404(b). Because the evidence pertained to Lindsay's consciousness of guilt, and because the prosecution at least inferentially linked Lindsay to the threats, the evidence regarding witness threats is also relevant. *See Settle*, 111 Ariz. at 396, 531 P.2d at 153; *Contreras*, 122 Ariz. at 480, 595 P.2d at 1025. Therefore, questioning about threats made to the neighbors was permissible and no prosecutorial misconduct

occurred. Because the questioning did not amount to prosecutorial misconduct, it does not constitute error, much less fundamental error.

B. Closing Remarks as to the Origin of Lindsay's Tattoos

¶9 Lindsay also argues that the state engaged in misconduct by suggesting during trial and at closing, that Lindsay obtained a tattoo on his left arm only after he was arrested. Because the footage obtained from the security video in the tire shop shows an intruder with a tattoo only on his right arm, Lindsay claims the prosecutor made these statements and knew or should have known the statements were "not accurate." It is not prosecutorial misconduct, however, to "'argue all reasonable inferences from the evidence'" during closing. *State v. Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d 519, 529 (2008), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d 1184, 1197 (1998). The state's assertion that Lindsay tattooed his arm after the burglary is one potential explanation for the change in appearance and can be inferred from the evidence. Therefore, the assertion did not constitute prosecutorial misconduct and the court did not err, much less commit fundamental error, in permitting the state to argue it during closing.

¶10 Finally, Lindsay suggests that the cumulative effect of the misconduct denied him a fair trial. But because the prosecutor did not commit any misconduct, no cumulative effect exists.

Rule 404(b) Analysis

¶11 Lindsay next argues he was denied the right to a fair trial by virtue of the improper admission of evidence of other acts—namely, evidence regarding threats made to witnesses in the case. Because Lindsay failed to raise this issue below, we review solely for

fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. As we explained above, the trial court did not err in admitting evidence of threats made to witnesses because evidence of these threats was evidence of Lindsay's consciousness of guilt—not his character—and therefore does not fall under the purview of Rule 404(b). Because we find no error, there cannot be fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608.

¶12 Lindsay also argues, however, that admission of evidence regarding threats to witnesses should have been excluded under Rule 403, Ariz. R. Evid. Under Rule 403, relevant evidence, although usually admissible, may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice" to the defendant. Whether evidence should be excluded based on Rule 403 is for the trial court to decide in the exercise of its discretion and "will be affirmed on appeal unless a clear abuse of discretion appears." *State v. Connor*, 215 Ariz. 553, ¶ 32, 161 P.3d 596, 606 (App. 2007). Lindsay again claims he was prejudiced by the evidence of the threats because it was evidence of other "bad" acts. But we have determined that the trial court properly admitted this evidence to show consciousness of guilt. Therefore, this evidence was not "unfairly prejudicial." *Higgins v. Assmann Elecs., Inc.*, 217 Ariz. 289, ¶ 39, 173 P.3d 453, 463 (App. 2007) ("unfairly prejudicial" evidence suggests "'a decision on an improper basis, such as emotion, sympathy, or horror'"), *quoting Shotwell v. Donahoe*, 207 Ariz. 287, ¶ 34, 85 P.3d 1045, 1054 (2004). Because we find no abuse of discretion here, the trial court did not err, much less commit fundamental error, in admitting evidence of threats to the witnesses.

Insufficiency of the Evidence

¶13 Lindsay finally asserts that insufficient evidence existed to support his convictions. We will reverse a criminal conviction for insufficient evidence "'only where there is a complete absence of probative facts to support the conviction.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007), *quoting State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996). In determining whether the state has presented sufficient evidence, we "construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). When reasonable minds can differ on inferences that may be drawn from the evidence, the case must be submitted to the jury. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

¶14 Lindsay was apprehended after police saw him driving a vehicle matching the description two witnesses gave of the truck used during the offenses. And those witnesses testified that they had seen Lindsay enter the tire shop yard and remove tires. Although Lindsay questions the credibility of the state's witnesses, "'[n]o rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.'" *State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007), *quoting State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974).

¶15 The two surveillance cameras found during the search of Lindsay's home, were, according to the victim, identical to the two stolen from the tire shop. The search also yielded ten tires. The owner of the tire shop testified that more than ten tires were stolen. The state was not required to establish, as Lindsay suggests, that the same ten tires were found at

Lindsay's home. The owner of the tire shop also testified to values for the cameras and tires that collectively exceeded $3,000. Because sufficient facts exist to support Lindsay's convictions, we affirm the verdict.

Conclusion

¶16 In light of the foregoing, we affirm Lindsay's convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge